CHUA HEE HUNG & ORS.

v.

QBE SUPREME INSURANCE BHD.

SUPREME COURT, KOTA KINABALU
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[SUPREME COURT CIVIL APPEAL NO. 223 OF 1986]
8 JANUARY 1990

LAND LAW: *Prohibitory order - Application to set aside - Registered owner in receipt of purchase price and appellant granted vacant possession - Whether purchaser is bare trustee - Equitable ownership - Caveat - Does it create interest in land - Do the respondents have an equity and therefore priority - Prior equitable interest of purchaser under the contract of sale.*

The respondents were the plaintiffs in civil suit no. K 486 of 1983 against Syarikat Chemas Pemborong Sdn. Bhd.

On 24 January 1985, it was adjudged that Chu Yun, the 2nd defendant, was to pay the plaintiffs, QBE Supreme Insurance Berhad the sum of RM120,266.35 with interest at the rate of 12% p.a. from 14 January 1983 till 24 January 1985, statutory interest at 8% p.a. from the date of judgment until payment and loss of RM225.

On 17 May 1985 a Prohibitory Order was obtained against the 2nd defendant in respect of certain leases. However, on 25 September 1985 the 2nd defendant's solicitors notified the plaintiff's solicitors that their client had no more interest in the properties concerned.

On 15 November 1985, the 3 appellants took out an originating motion against the respondents QBE Supreme Insurance Berhad, applying for leave to intervene in civil suit no. K 486 of 1986 and for the prohibitory order to be set aside.

The High Court dismissed the application to set aside the prohibitory order and all subsequent proceedings and orders for sale.

The appellants now appeal.

Held:

[1] It is clear law that vendors on receipt of the full purchase price and surrender of possession of the lands to be purchased are deemed to be bare trustees for the purchaser.

[2] It is also trite law that when the Court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

[3] Neither a Prohibitory Order nor a caveat creates a legal interest in the land.

[4] In this case, it is not the caveat which confers on the purchaser a better claim but the prior equitable interest which the purchaser obtains, under the contract of sale. This equitable interest is not lost by the fact that the appellants delayed in registering their interest.

[5] The appellants failure to lodge private caveats to protect their beneficial interest in the lands, does not advance the case of the respondents, inasmuch as the Prohibiting Order could not overrule the beneficial interest of the appellants in the properties attached.

Moreover, the effect of entry of a caveat expressed to bind the land itself, is to prevent any registered disposition of the land except with caveator's consent or until the caveat is removed by a Court order.

[6] The learned Judge had overlooked the fact that there was no dispute from any party including the respondents that the 2nd defendant had sold all his beneficial interest to the appellants.

[7] As the 2nd defendant had no beneficial interest in the said lands there was nothing which the respondent judgment creditor could legally seize and sell.

[8] The learned Judge should have granted the application of the appellants and set aside the prohibitory order dated 17 May 1985.

[Appeal allowed.]

Cases referred to:
Temenggong Securities Ltd. & Anor. v. Registrar of Titles & Ors. [1947] 2 MLJ 45
Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 116
United Malayan Banking Corporation Bhd. v. Goh Tuan Laye [1976] 1 MLJ 169
Ng Kheong Yeow v. Chiah Ah Foo & 3 Ors. [1987] CLJ (Rep) 254
Coleman v. De Lissa [1885] 6 NSWR (Eq) 104
Lin Nyuk Chan v. Wong Sz Tsin [1964] MLJ 200
Chang v. Registrar of Titles [1976] 50 ALJR 404
Whitworth v. Gaugin [1844] 67 ER 444
Langton v. Horton 1 Hare 549
Ng Boo Bee v. Khaw Joo Choe & Ors. [1921] 14 SSLR 90
Eng Mee Yong & Ors. v. V.Letchumanan [1979] 2 MLJ 212

Legislation referred to:
Courts of Judicature Act 1964, s. 42
Land Ordinance (Cap 68) (Sabah), ss. 88, 94, 100, 103, 116

For the appellants - Bonnie Lo (David Wong with him); M/s. Peter Lo & Co.
For the respondents - C.I. Robertson; M/s. Skinner Lind Robertson Willie Wong & Chin

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This is the second time that this appeal came before this Court. It was actually heard on 9 June 1988 before me, Sulaiman SCJ and Seah SCJ. Judgment was reserved. But before judgment could be delivered certain events took place resulting in the rehearing of the appeal pursuant to s. 42 of the Courts of Judicature Act 1964.

The respondents who were plaintiffs in Kota Kinabalu High Court Civil Suit No. K. 486 of 1983 sued Syarikat Chemas Pemborong Sdn. Bhd. (1st defendant), Chu Yun (2nd defendant), Yap My Chue (f) (3rd defendant), Syarikat Pemborong Maju Satu Sdn. Bhd. (4th defendant), Ho Yun Kiong (5th defendant) and Hing Nyuk Ching (6th defendant). On 24 January 1985 it was adjudged that Chu Yun do pay the plaintiffs, QBE Supreme Insurance Bhd. the sum of RM120,266.35 with interest at the rate of 12% per annum from 14 January 1983, statutory interest at 8% per annum from the date of judgment until payment and costs of RM225. The balance sum of RM32,550.25 together with accruing interest and costs remained unsatisfied. On 17 May 1985 a prohibitory order was obtained against Chu Yun in respect of:

(i) 1/16 undivided share of Lease No. 077508288 (not relevant to the appeal);

(ii) 1/20 undivided share of Lease No. 077516155;

(iii) 1/42 undivided share of Lease No. 077508242. *a*

(These are subject matters of the appeal)

The prohibitory order was registered against Leases Nos. 077516155. It was renewed on 1 October 1985.

On 25 September 1985 solicitors for Chu Yun formally notified the plaintiffs' solicitors that "our client has no more interest in the properties concerned. The said properties have been sold for more than ten (10) years which documentations are handled by Messrs. Lo & Co. We suggest that you liaise with Messrs. Peters Lo & Co. for more details." *b*

On 15 November 1985 the three appellants took out originating motion against the respondents QBE Supreme Insurance Bhd. applying for leave to intervene in civil suit no. K.486 of 1983 and for the prohibitory order to be set aside on the ground that Chu Yun has no saleable interest in the land comprised in Sandakan Town Leases Nos. 077516155 and 077508242. The application was supported by the affidavits of all three appellants. After hearing the submission of both parties the learned Judge dismissed with costs the application to set aside the prohibitory order and all subsequent proceedings and orders for sale. The appellants were dissatisfied with the decision and have appealed to this Court against the decision. *c* *d*

The documentary evidence filed by the appellants in the Court below appear to establish the following:

(i) On 17 February 1970 the 1st appellant entered into a sale and purchase agreement to buy one unit of flat to be erected by Chu Yun and another which flat is now known as 1/20 undivided share in Sandakan Town Lease No. 077516155; *e*

(ii) On 10 October 1970 the 2nd and the 3rd appellants entered into a sale and purchase agreement to buy one unit of flat to be erected by Chu Yun and another which flat is now known as 1/42 undivided share in Sandakan Town Lease No. 077508242;

(iii) That the full purchase price of the said flats had been paid to and received by Chu Yun some 15 years ago; *f*

(iv) That the appellants had entered into and are now in possession of the said flats after they had been completed some 15 years ago;

(v) That a memorandum of transfer in the statutory form was executed by the vendors and the purchaser in Lease No. 077516155 in respect of the 2/20 undivided share;

(vi) That Chu Yun is the registered owner of (a) 1/20 undivided share in Sandakan Town Lease No. 077516155 and (b) 1/42 undivided share in Sandakan Town Lease No. 077508242 on 17 May 1985. *g*

The position is clear. Chu Yun was and is still the registered owner of (a) 1/20 undivided share in Lease No. 077516155 and (b) 1/42 undivided share in Lease No. 077508242 albeit he had sold his interest in these two parcels of land to the appellants in 1970, had received full payment of the purchase moneys and had allowed the appellants to enter into possession of the two units of flats. *h*

In Peninsular Malaysia the law is clear, viz., the vendors after receipt of the full purchase price and surrender of possession of the lands to the purchasers are deemed to be bare trustees for the purchasers (see *Temenggong Securities Ltd. & Anor. v. Registrar of Titles & Ors.* [1947] 2 MLJ 45. In that case Ong Hock Sim FJ speaking for and on behalf of the Federal Court stated: *i*

We are in agreement with the majority view in *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 45 where it was:

> Held (1) in this case Mohamed Sharjudin having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent (purchaser) who was the equitable owner ...

In *Karuppiah's* case [1971] 2 MLJ 116 the vendor sold the land to the purchaser. A transfer was executed but not registered. On 13 November 1968 the purchaser entered a caveat. 14 April 1969 the judgment creditors obtained judgment against the vendor and registered a prohibitory order on the property already sold to the purchaser. The High Court granted the purchaser's application to set aside the prohibitory order. The judgment creditors appealed to the Federal Court. The appeal was dismissed on the ground that the vendor having sold his entire interest in the land and received payment in full held the legal estate as trustee for the purchaser who became the equitable owners. The judgment creditor could only take whatever interest the debtor had. Ong CJ (Malaya) made no bones about the matter when he said:

> It is trite law that when the Court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

Gill FJ was equally blunt when he asked:

> If the land cannot be sold, what is the point in allowing a prohibitory order to stand on the register?

In *Temenggong's* case the vendor sold certain lands to the purchaser. On 14 December 1972 the memorandum of transfer was presented for registration. On 19 December 1972 the creditors lodged a prohibitory order on the said lands. So the memorandum of transfer was rejected as there was a Registrar's caveat. The High Court dismissed the purchaser's application to cancel the caveat. The Federal Court allowed the appeal on the ground that the vendors having parted with the interest in the land they became bare trustees and had no interest in the land over which a caveat could be lodged. In the instant case the learned Judge took the view that the absence of a caveat was the distinguishing factor to *Karuppiah's* case. This makes no difference as a caveat does not create any legal interest in the land.

Tun Suffian then LP in *United Malayan Banking Corporation Bhd. v. Goh Tuan Laye* [1976] 1 MLJ 169 & 170 explained the position lucidly at p. 170:

> ...possession of the titles gives them an equitable interest in the lands, which is not affected by the absence of a caveat, as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor.

In the same way in *Ng Kheong Yeow v. Chiah Ah Foo & Ors.* [1987] CLJ (Rep) 254 the Supreme Court held that even though the respondent failed to lodge a caveat, it did not deprive him in having a better equity against the appellant who had lodged a caveat. The reason being that the appellant had nothing to caveat as the vendor had already sold all his interest to the respondent.

Reference was made to s. 100 and s. 103 of the Sabah Land Ordinance (Cap. 68). Section 100 deals with registration and reads:

> If the Registrar shall decide that the document presented is in order and fit for registration, he shall, in the absence of any lawful prohibition of registration thereof and on receiving payment of the prescribed fees, endorse upon the document of title and upon the issue copy or extract from the register a brief memorial showing the nature of the dealing and date of

registration and also, except in cases of satisfaction of charge and surrender of title for cancellation, exchange or sub-division, the names of the parties and hour of registration. Every such endorsement shall be made or attested by the Registrar and shall contain a reference to the memorandum on which it is based and its serial number in the register of memorials:

Provided that if the document presented is a judgment, order or decree issuing from any Collector of any Court in Sabah the Registrar may refuse registration until the expiry of the period of appeal against such judgment, order or decree.

Section 103 deals with priority and reads:

All memorials and memoranda shall be numbered serially in order of priority of registration. For purposes of priority the time of presentation shall be taken as the time of registration, without regard to the date of execution of the memorandum, or to any express or implied or constructive notice contained in the document:

Provided that if a memorandum has been returned for correction under s. 99 it shall take priority from the time it is presented afresh.

The contention of the respondents is that they have an equity and therefore they have priority. As the appellants have not lodged any caveat the respondents argued that their failure to do so for the last 15 years affects priority. The appellants have forfeited their prior equity. Section 116 of the Sabah Land Ordinance (Cap. 68) deals with caveat but it does not make the registration of caveat mandatory. If a purchaser fails to lodge a caveat to protect his equitable interest then it is a risk he must take. Both parties take the same view that the effect of a prohibitory order is the same as a caveat. But one thing is clear. Neither a prohibitory order nor a caveat creates a legal interest in land. The question here is whether there was any interest which could be attached by a prohibitory order.

At p. 119 in *Karuppiah's* case Gill FJ likened a prohibitory order to a writ of *fi.fa.* (*fieri facias*) of which in *Coleman v. De Lissa* [1885] 6 NSWR (Eq) 104, 111 Faucett APJ said:

It seems to me that the entry of the writ of *fi.fa.* does not necessarily bind all the estate or interest that appears on the face of the certificate of title to belong to the holder of the certificate; but that all it can mean is that any subsequent dealing with the land shall take effect only after the writ so entered had been satisfied, or shall be void as against the sheriff's sale under the writ. But I do not think that any previous *bona fide* transaction between the registered owner and another person, although not registered, of which, at all events, the purchaser at the sheriff' sale has notice, can be affected. The interest which the sheriff can sell is still, as it was before, the beneficial interest that was in the registered owner at the time of the entry or of the sheriff's sale.

In our case it is not the caveat which confers on the purchaser a better claim but the prior equitable interest which the purchaser obtains under the contract of sale. This equitable interest is not lost by the fact that the appellants delayed in registering their interest. The parties to the contract of sale may have breached s. 94 of the Sabah Land Ordinance (Cap. 68) but this does not affect their contractual rights. Section 94 reads:

(1) Every person acquiring the possession of land or the profits thereof or any interest therein whether as purchaser or on the death of the owner, or as charges, or otherwise, howsoever, shall give notice of such acquisition, immediately after it has taken place, to the collector:

Provided that no land shall be transferred or sub-leased except to an individual person or persons, company or body corporate such as is defined in s. 10.

(2) The collector on receiving such notice shall call upon the parties concerned to comply with the requirements of this part or shall take such action under Part VI hereof as may be required.

(3) Any person neglecting to comply with the requirements of this section within three months from the date of the dealing or transfer or acquisition of interest or omitting without reasonable excuse to comply with any order of the collector made under subsection (2) within the time stated in such order shall be guilty of an offence against this Ordinance and shall be liable to a fine of five hundred dollars and to the payment of a sum equivalent to double the amount of any unpaid stamp duties and fees payable on the dealing and registration thereof.

This section and s. 88 had been the subject of judicial decision in *Lin Nyuk Chan v. Wong Sz Tsin* [1964] MLJ 200 which involved and unregistered tenancy agreement for a period of 15 years. The observation of Wylie CJ (Borneo) who wrote the leading judgment of the Federal Court, which was concurred by Thomson LP and Wee Chong Jin CJ (Singapore), in our opinion, could apply with equal force to a legally binding and enforceable sale and purchase agreement.

Dealing with s. 94, Wylie CJ (Borneo) made these observations:

Reference was also made in the course of arguments to s. 94 of the ordinance, by virtue of which the appellant should have notified the Collector of Land Revenue that he had acquired possession of these premises. The Collector may then call upon the parties to register the transaction and it is an offence not to notify the collector or to comply with his requirement to register, for which punishment is provided under the section. This provision is clearly designed to compel parties to keep the register up-to-date, but it provides its own penalty and has no effect on the contractual rights of the parties as between themselves. Nor does it prohibit late registration. In my judgment, neither this section, nor the failure to comply with it, affects the issue of specific performance having regard to all the facts relevant to that issue in this case.

We agree with what had been stated by the Federal Court on the construction of s. 94 of the Sabah Land Ordinance (Cap. 68). In *Chang v. Registrar of Titles* [1976] 50 ALJR 404 at p. 411 Jacobs J stated:

It is true that a vendor at the stage of contract where the contract is enforceable by specific performance has at times been described as a trustee: see for example *Shaw v. Foster* [1872] LR 5 HL 321; *Lysaght v. Edwards* [1876] 2 Ch.D. 499 and if by that no more is meant than that the purchaser is regarded by equity as the beneficial owner of the estate of which the vendor is the legal owner then there is no difficulty in describing the vendor as a trustee.

Jacobs J appears to support the vendor/trustee relationship if the sale and purchase agreement is enforceable by means of specific performance.

In our view, since the Sabah Land Ordinance (Cap. 68) and the National Land Code 1965 are modelled on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah if specific performance is ordered by the High Court except so far as they are precluded from doing so by statutes and none has been pointed out to us by learned Counsel for the respondents. What the respondents are trying to put forward is that there are competing equities but they have not clearly stated what are their equitable interest in the land. In effect, they are saying that they have registered the prohibitory order but the appellants have not protected their interests by lodging any caveat. Therefore, they say the appellants have lost their priority.

In *Karuppiah's* case Ong CJ (Malaya) said at p. 117:

In my opinion the answer to the first and third grounds is summed up in a short passage from the judgment delivered by Lord Wilberforce in *Chung Khiaw Bank v. United Overseas Bank Ltd.* [1970] 1 MLJ 185, 186, PC thus:

> ... under the general law, apart from the provisions as to registration and in certain circumstances even where such special provisions exist, the judgment creditor can only take whatever interest the debtor has and ... is such a case, questions of priority and correspondingly of postponement through failure to register, do not arise.

His Lordship had cited with approval *Whitworth v. Gaugain* [1844] 67 ER 444, 447 in which Wigram VC said:

> I feel that I stated the general principles correctly in *Langton v. Horton* 1 Hare, 549 when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it.

In *Ng Boo Bee v. Khaw Joo Choe & Ors.* [1921] 14 SSLR 90, 95 Sproule J whose decision was upheld on appeal said:

> I have to decide, not any question of priorities, but the question of the right of the execution creditor to seize at all. It is not a dispute between various creditors of a debtor whose land is rightly under seizure; it is an issue whether plaintiff may seize and sell another man's land because of the accident of the legal title still remaining in defendant's name at the time of seizure.
>
> I think it is very clear that only such beneficial interest as a judgment debtor possesses can be seized and that the order of attachment is an assurance affecting only such beneficial interest in the land.
>
> As Counsel on both sides agreed tersely to express it, a judgment creditor may seize only what the debtor can lawfully sell. Where it is admitted, as in this case, that there is no beneficial interest in the debtor at all, no question as to priority of registration can arise.

In our judgment, the appellants' failure to lodge private caveats to protect their beneficial interests in the lands does not advance the case of the respondents inasmuch as the Prohibitory Order could not override the beneficial interest of the appellant in the properties attached. Moreover, the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent or until the caveat is removed by a Court order. (See *Eng Mee Yong & Ors. v. V.Letchumanan* [1979] 2 MLJ 212 at p. 214B.)

The case of *United Malayan Banking Corporation v. Goh Tuan Laye & Ors.* was concerned with competing equitable interests in the land, both interests being unregistered and unprotected by caveats. But, in our case we are dealing only with the equitable interests claimed by the appellants in Leases Nos. 077516155 and 077508242. There was no question of any equitable interest being claimed by the respondent here.

One of the grounds for the learned Judge's refusal to set aside the Prohibitory Order is that the appellants did not ask for a declaration as not all parties' rights (including Chu Yun's rights) could be adjudicated. With respect, the learned Judge has overlooked the fact that there was no dispute from any party including the respondents that Chu Yun had sold all his beneficial interest to the appellants. Also, the solicitors for Chu Yun had written to the solicitors for the respondent on 25 September 1985 to say that he had no more interest in the properties concerned. There was no objection to the manner in which the appellants chose to intervene. The appellants could have filed a separate action. In whatever way the matter comes before the Court the issue would be the same and the outcome of the action would be the same. It is for this reason that Gill FJ in *Karuppiah's* case remarked at p. 121 that "the Courts do not encourage multiplicity of proceedings to no purpose."

Although the judgment debtor Chu Yun was the registered owner of (a) 1/20 undivided share in Sandakan Town Lease No. 077516155 and (b) 1/42 undivided share in Sandakan Town Lease No. 077508242 he was holding the said land as bare trustees for the appellants. As Chu Yun had no beneficial interest in the said lands there was nothing which the respondent judgment creditor could legally seize and sell. On the facts of this case and the authorities cited the learned Judge should have granted the application of the appellants and set aside the Prohibitory Order dated 17 May 1985. Otherwise, as Ong CJ (Malaya) pointed out in *Karuppiah's* case at p. 118 that is a supreme exercise in futility when it is clear beyond peradventure that under such order there is nothing which can be put up for sale." For reasons given we would allow the appeal and set aside the prohibitory order of 17 May 1985. The appellants are entitled to their costs both here and the Court below to be taxed. The deposit is to be refunded to the appellants.

Also found at [1990] 1 CLJ 669